APR 30 1956
HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

No. 916 Term, ~~1956~~

COMMONWEALTH OF PENNSYLVANIA

vs.

KARL E. MORRISON,
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND TO THE SUPERIOR COURT OF PENNSYLVANIA

KARL E. MORRISON,
Petitioner.

233 Schenley Drive
Erie, Pennsylvania

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.
Frank Baumeister, Erie County Representative, Court House, Erie, Pa.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND TO THE SUPERIOR COURT OF PENNSYLVANIA

Petitioner, Karl E. Morrison, prays that a Writ of Certiorari issue to review the judgment of the Superior Court of Pennsylvania entered in the above entitled case on November 16, 1955, and the refusal of the Supreme Court of Pennsylvania to allow an appeal from said judgment.

OPINIONS BELOW

The opinion of the Superior Court of Pennsylvania is reported in 180 Pa. Superior Court 121, and in 118 Atlantic 2nd 258. The Supreme Court of Pennsylvania did not render an opinion.

JURISDICTION

The judgment of the Superior Court of Pennsylvania was pronounced on November 16, 1955, and a Petition For Allowance of Appeal was presented to the Supreme Court of Pennsylvania on December 8, 1955, filed at No. 2053A, Miscellaneous Docket, and on January 31, 1956 was refused.

Opinions Below and Jurisdiction

The Act of Assembly of the Commonwealth of Pennsylvania on June 24, 1895, P.L. 212, Section 7 (amended May 21, 1941, P.L. 47, Sect. 1) and Section 7 (a); 17 P.S. Secs. 181 and 182; provides:

> "It (the Superior Court of Pennsylvania) shall have exclusive and final appellate jurisdiction of all appeals in the following classes of cases: * * *
>
> All proceedings of any kind in the Court of Quarter Sessions of the Peace, or before any judge thereof, except in cases involving the right to a public office in which case the remedy by appeal to the Supreme Court shall not be affected by this Act".

The said Act of 1895, Section 7 (e), 17 P.S. Sec. 190 provides:

> "Nevertheless in any action or proceedings whatever above committed to the final and exclusive decision of the said Court there may still be an appeal from its judgment to the Supreme Court: * * *
>
> Second. If the case involved the construction or application of the Constitution of the United States or of any statute or treaty of the United States; * * *
>
> Fourth. If the appeal to the Supreme Court be specially allowed by the Superior Court itself or by any one justice of the Supreme Court."

The defendant, petitioner herein, presented his Petition For Allowance of Appeal to the Supreme Court of Pennsylvania on December 8, 1955, and on January 31, 1956 the petition was refused, without opinion. The jurisdiction of this Court is invoked under the provisions of the Act of Congress, June 25, 1948, c. 646, 62 Stat. 929, 28 U.S.C.A. sec. 1257 (3).

QUESTIONS PRESENTED

1. Was the petitioner deprived of his right to due process guaranteed by the Fourteenth Amendment of the Constitution of the United States, when he was required to stand trial under conditions then in existence and in the face of improper and undue remarks of the District Attorney during the trial, and in the midst of a great deal of unwarranted newspaper publicity, and in the absence of a very important witness who had been duly subpoenaed by the defense; and

2. Was the petitioner deprived of his right to due process guaranteed by the Fourteenth Amendment of the Constitution of the United States by the admission into evidence of totally unproved letters which served only to prejudice the jury against the petitioner?

CONSTITUTIONAL PROVISION INVOLVED

The due process clause of the Fourteenth Amendment to the United States Constitution (U.S.C.A., Constitution, Part 3, page 2) which reads:

> "Section 1. * * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *".

STATEMENT OF THE CASE

1. *Procedural History of the Case*

The petitioner was charged with the crime of sodomy with four separate individuals, the cases tried together on September 14, 15 and 16, 1954. The only witnesses produced by the Commonwealth were the supposed accomplices to the acts, there not having been any witnesses to the alleged acts except on Roger Sampson, who the Commonwealth did not produce but who the defense had duly subpoenaed. The said witness did not appear at the trial and the Court nevertheless refused a motion for continuance. During the trial the Commonwealth introduced, over objection, letters written by one Donald Johnson to one of the alleged accomplices, Jack Russell. The letters were not shown to have any authorization or connection with the defendant, Karl Morrison, but were allowed merely to arouse prejudice against the defendant.

Further, the District Attorney, during the trial made remarks to the jury that the defendant did not take the stand to defend himself, and other such remarks calculated only to arouse the prejudice of the jury and deprive defendant of a fair trial. Further, during the three days of the trial the local newspapers continually published articles and pictures calculated to arouse prejudice against the defendant.

Defendant was found guilty on September 16, 1954, and a motion for new trial made September 20, 1954, argued on November 22, 1954, and denied.

Statement of Case

2. *Facts Material to the Questions Presented*

The Court refused a motion to continue the trial of defendant until a very important witness, Roger Sampson could be brought into court by sheriff or other law enforcement officers, the said witness having been duly subpoenaed by the defendant to appear at the trial. The only person who could have denied these acts other than the defendant was this subpoenaed witness, whose affidavit the defendant had in court and which the court ignored, the said affidavit being a denial that any such acts took place in the presence of the deponent.

As the trial continued the Court allowed the Commonwealth to introduce two letters into evidence against the defendant, letters of which the defendant had no knowledge and which were not written in his behalf, but which letters were very prejudicial to the defendant. The letters advised one of the alleged accomplice witnesses to stay out of the State and were addressed to the said witness at his Ohio address.

Newspaper publicity appeared in the papers prior and during the trial, articles and stories which recited in detail the prior criminal record of the defendant, and on the very day the jury received the case, a story about the defendant containing not only his criminal record, but also a statement that he would not take the stand to defend himself because then the Commonwealth could introduce his prior criminal record to the jury.

During the progress of the trial and in summation to the jury the District Attorney appealed to the passion and prejudice of the jury by stating that the defendant did

not take the stand to defend himself; and other similar remarks designed to deprive the defendant of a fair and impartial trial.

3. *Federal Question Raised Below in Trial Court and Before the Superior and Supreme Courts of Pennsylvania*

The said points were raised in the trial court in the motion for new trial and on argument thereon; and in the Superior Court of Pennsylvania in the Statement of Questions Involved; and in the Supreme Court of Pennsylvania in the Petition for Allowance of Appeal.

ARGUMENT

CERTIORARI SHOULD BE GRANTED IN THE INSTANT CASE BECAUSE AN IMPORTANT QUESTION AFFECTING THE RIGHTS OF ACCUSED UNDER THE FOURTEENTH AMENDMENT IS INVOLVED

The "due process" clause of the Fourteenth Amendment requires that the accused be afforded not only a fair and impartial trial but also that all the incidents of trial be fair and without prejudice to his rights. The defendant did not receive a fair and impartial trial in the Court below in that:

1. He was deprived of time to bring into court in his defense a very important witness, Roger Sampson, who, it was testified by the Commonwealth witnesses, was present at the time of the alleged illegal acts. This witness, as shown by his affidavit, would have denied the occurrence of any such acts and the trial judge should have allowed the defendant reasonable time to have the sheriff or police bring this witness, who was under subpoena, into court to testify. It is significant that the Commonwealth knew of the presence of this witness at the time of the alleged acts, and yet made no effort to produce him at trial. The only witness the Commonwealth produced was the alleged accomplice himself, who, under the law of Pennsylvania is of such untrustworthy character that his testimony must

be scrutinized very carefully as coming from a corrupt and polluted source.

The testimony of Jack Russell, the *sole* Commonwealth witness in No. 99 September Sessions, 1954 on pages 16a, 24a, and 44a of the Record in the Superior Court of Pennsylvania contains the following:

> "Q. Do you recall the first time that that happened?
>
> A. Yes, well there was Roger Sampson and I, we slept on a daybed which was in the dining room, and we was asleep there and he was bothering me.
>
> Q. What do you mean, '—he was bothering me'. You'll have to tell us.
>
> A. Well, he went down on me and I didn't know nothing about it, and then my buddy [Roger Sampson] told me about it the next morning."
>
> "Q. Who told you about it the next morning?
>
> A. Roger Sampson."
>
> Q. You say that these attacks took place while somebody else was in the room besides you and Mr. Morrison?
>
> A. Roger Sampson."

The testimony of Lloyd Stiffey, the *sole* Commonwealth witness in No. 96 September Sessions, 1954 also shows the importance of the absent witness, Roger Sampson, on pages 61a and 64a of the Record printed for the appeal in the Superior Court of Pennsylvania:

> "Q. Did you try to get help or anything, or did you try to holler or anything?
>
> A. As I say, I went into the bathroom and I thought he was coming after me when I heard some-

body chase me. So here it was Roger [Sampson], and Roger came into the room with me, in the bathroom."

The petitioner knows that Roger Sampson would have openly and directly contradicted the testimony of Jack Russell, the sole Commonwealth witness in one case, and of Lloyd Stiffey, the sole Commonwealth witness in another case, had the Court allowed petitioner a reasonable time to produce the witness. The Court refused to examine affidavits of the absent witness to the effect that he had been at Mr. Morrison's home but had never seen or heard petitioner do anything of an immoral nature, and other such statements which would have directly contradicted the sole Commonwealth witnesses in two of the cases.

The petitioner did not in any way attempt to delay or stall the trial. The subpoena was served on Roger Sampson on September 6, 1954, for appearance on September 14, 1954, the day of trial of the petitioner. When the witness failed to appear, the petitioner, on the very first day of the trial paid the sheriff of Erie County a fee of $10.00 to pick up the subpoenaed witness. When the sheriff, after a mere token attempt to pick up the witness, reported on the second day of the trial that he did not get to see the witness, the petitioner asked the Court to immediately issue a bench warrant for the absent witness. The sheriff did not serve this bench warrant and did not even solicit the aid of the City of Erie Police of the Pennsylvania State Police. Petitioner, on the other hand, did all in his power to get the absent witness into Court, and a short continuance to assure the presence of this witness should have been granted. The petitioner was

thus deprived of a fair and impartial trial and of having his day in Court.

2. Adverse newspaper publicity before and during the progress of the trial deprived him of a fair and impartial trial in that the jury was given continuous information as to prior criminal record, and other such matters, inadmissible as evidence, which deprived them of judging the cases on the evidence presented in Court.

The Erie Daily Times, the largest newspaper in Erie, on the last day of the trial, before the case had gone to the jury and before the defense had rested, printed on the first page of the second section a large picture of the defendant taken in the halls of the Court House and ran a lengthy article beneath the picture stating that the defendant would not take the stand in his own defense because if he did so the District Attorney would be able to bring before the jury the prior criminal record of the defendant, and that defendant had been previously convicted on morals charges (page 185a of record). The jury did not go out until very late in the afternoon and had ample time to read this feature story, and to hear it on the radio news programs, and to see it on television.

The same article mentioned also that in addition to his prior convictions on morals offenses the defendant, Karl Morrison, had been charged in a case yet to be tried, with hindering a witness in that he had induced one of the prosecution witnesses to go to Ohio.

b. On the day before the case went to the jury the same newspaper printed on the very front page, a story on the defendant that was so lengthy that it had to be continued on to another page. The two column headline

in the Times on September 15, 1954 read: "Witnesses Jam Court for Architect's Trial", and stated, among other things that he was charged not only with four morals offenses against young boys, but also that he is charged with hindering a witness, and that he already has a record for prior morals offenses. Similar stories appeared almost daily before the trial.

In *Griffin vs. United States*, 295 F. 137, 1924, the Circuit Court of Appeals held that the Court below erred in not withdrawing a juror and granting a new trial where newspapers containing prejudicial statements were read by the jurors

> "It is the right of a defendant accused of a crime to have nothing reach the mind of the jury concerning the case except strictly legal evidence admitted according to law, and if facts prejudicial to him reach the jury otherwise it is the duty of the trial judge to grant a new trial."

The Court in *United States vs. Ogden*, 105 F. 371, said that a defendant convicted in a criminal case is entitled to a new trial where it is shown that some of the jurors read an article published in a newspaper before the case was submitted to the jury which declared the defendant guilty and contained many prejudicial statements and charges against him which would not have been admissible in evidence, besides commenting upon his failure to testify in his own behalf.

Any caution by the Court to the jurors to judge the case only on the basis of evidence submitted in Court is meaningless and does not assure the defendant of a fair trial once the damaging articles were published in the

newspapers, and put over the airwaves, and read, heard, seen and discussed by the jurors.

In *Delaney vs. United States*, 190 F. 2d 107, 1952, the Court vacated the judgments entered on a guilty verdict because of adverse newspaper publicity. The Court assumed the trial judge did all in his power to mitigate the effect of the damaging publicity by way of cautionary remarks in his charge to the jury, but the Court nevertheless quoted Mr. Justice Jackson in *Krulewitch vs. United States*, 336 U.S. 440, 453; 69 S. Ct. 716, 723; 93 L. Ed. 790 (1943), in which case he stated:

> "The main assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be an unmitigated fiction."

In *Shepherd vs. Florida*, 34 U.S. 50, 95 L. Ed. 740 (1951), where a conviction of murder was reversed in a per curiam opinion, Justice Jackson, in a concurring opinion, expressed himself strongly on the subject of trial publicity. He stated:

> "But prejudicial influences outside the courtroom, becoming all too typical of a highly publicized trial were brought to bear on this jury with such force that these defendants were prejudged as guilty and that the trial was but a legal gesture to register a verdict already dictated by the press and public opinion which it generated".

So similarly the two Erie newspapers, in competition with each other, started a campaign to punish and convict all persons accused of a sex charge, whether guilty or

not. News of real importance was relegated to the back pages and stories concerning sex offenders were given prominence. The newspapers of Erie and the public opinion generated by them had already dictated the guilty verdict in this case, so that the trial was merely a legal gesture to register this already formed verdict.

3. The petitioner was denied a fair and impartial trial in that the District Attorney, over objection, made remarks to the jury that the defendant did not take the stand in his own behalf and that he did not deny the facts. The Evidence Act of May 23, 1887, P.L. 158, Sec. 10; 19 P.S. 631, states that the neglect or refusal of any defendant to offer himself as a witness may not be treated as creating any presumption against him, nor be adversely commented upon by Court or counsel during the trial.

In the present case the District Attorney made statements to the jury as follows:

> "Let's look at Karl Morrison's defense. There has been no denial of these acts, there has been no denial in any manner, shape or form, by anyone, of these acts." (pages 177a, 178a, 179a and 180a of the record).

Where the defense of alibi is not used such remarks are violative of the Evidence Act and violative of the defendant's right to a fair and impartial trial, *Commonwealth vs. Saldutte*, 136 Pa. Superior Ct. 52, 7 A. 2d 121, especially where, as in the present case, no one can testify on the subject but the defendant. A reference to a failure to deny the Acts in such cases is a reference that the defendant did not take the stand to defend himself, and constitutes an adverse and prejudicial comment. Especially

is this an adverse and prejudicial comment where the defendant, as in this case, tried to get an absent witness into Court as to two of the charges and the Court refused to grant even a slight continuance or extension to allow for his appearance in Court.

New trials on the basis of such prejudicial and unfair remarks by the Commonwealth were granted in the following cases:

Commonwealth vs. Green, 233 Pa. 291, 82 A. 250: "There is no one on earth who can tell us how these things came into the possession of the prisoner, but the prisoner".

Commonwealth vs. Foley, 24 Pa. Superior Ct. 414: "You have this woman here without denial".

Commonwealth vs. Saldutte, 136 Pa. Superior Ct. 52, 7 A. 2d 12;

United States vs. Sprengel, 103 F. 2d 876 (1939);

Commonwealth vs. Carr, 137 Pa. Superior Ct. 346, 10 A. 2d 133 (1940).

If the present case were one in which many people were involved then any one of several persons could be called to deny the act charged and such a statement would not be prejudicial (*Com. vs. Martin*, 34 Pa. Superior Ct. 451), but in the present case there is no one to deny the acts charged but the defendant himself, so that these remarks were prejudicial and deprived the defendant of a fair and impartial trial.

The District Attorney, over objection, made further remarks to the jury which were calculated to deprive the

petitioner of a fair and impartial trial. These remarks were to the effect that defendant was ill and would be put into some hospital etc to be cured if found guilty (pages 178a, 179a, 180a of record); and other remarks to the effect that if the jury allows men like defendant to be out in society then we never know whose child will be next, and that unless he is taken out of society other children will suffer, and that "We've got to do something about people like Morrison, these sex perverts" (page 178a of record). All of these remarks did exactly as they were intended to do, that is, to prejudice the jury and to deprive the defendant of a fair and impartial trial.

In *United States vs. Sprengel*, 103 F. 2d 876, 1939, the Court stated that the words "We've got to convict these people, they will go wild with this sort of thing", were highly prejudicial and awarded a new trial.

In *Commonwealth vs. Balles*, 160 Pa. Superior Ct. 148, 50 A. 2d 729, where the District Attorney said: "That the defendant, if he were to go free could not be tried again", the Court held that the words served to arouse prejudice and awarded a new trial.

So similarly *Commonwealth vs. Williams*, 309 Pa. 529, 164 A. 532; *Commonwealth vs. Cicero*, 282 Pa. 492, 128 A. 446; and many others.

4. The defendant was denied a fair and impartial trial in that the Commonwealth, over objection, introduced certain letters into evidence against the defendant, letters which served only to inflame the jury against him and had no legal basis for their admission. The letters were written and signed by one Donald Johnson and were not in any way proved to have been written with the knowl-

edge, authorization or consent of the defendant. Thus this case differs entirely from *Commonwealth vs. Marion*, 232 Pa. 413, cited by the Court below as authority for admission of these prejudicial letters, for in the Marion case the person who wrote the letter testified in Court that he wrote the letter at the request of the defendant and that defendant told him the purpose for which the letter was to be written. Such, however, is not the present case, and there was not the slightest bit of testimony to show that defendant had knowledge of, or authorized, these letters. The letters served only to prejudice the jury and deprive defendant of a fair trial (pages 183a and 184a of record.)

One letter was postmarked: Erie, Pa. May 25, 1954; and Conneaut, Ohio, May 26, 1954; and requests Jack Russell to call 2-2414 and states that "everything is fairly quiet here and under control. P.S. And please keep entirely out of Pa." (184).

Testimony of Jack Russell, Commonwealth witness, showed that telephone 2-2414 was in the office and home of Karl Morrison where the said writer, Donald Johnson, worked and boarded.

The second letter was postmarked: Erie, Pa. May 27, 1954; and Conneaut, Ohio, May 28, 1954; and states "enclosed is cash . . . meantime stay over there out of sight" and is signed by Don Johnson (183a of record).

In *United States vs. Nicola*, 72 F. 2d 780, the Court said:

> "A letter does not prove itself. In order to make the letter evidence the letter must be shown to have been written by the person against whom it is produced or by someone authorized to act in his behalf."

"Its admission was clearly erroneous and unless it appears beyond a doubt that the improper evidence admitted did not, and could not have, prejudiced the rights of the party objecting, a new trial should be awarded."

The Court below relied on a purported scheme between the defendant, Karl Morrison, Commonwealth witness Jack Russell and Donald Johnson. The testimony, however, shows only that Jack Russell and Don Johnson lived together and were good friends. There was no testimony that Don Johnson knew of any conversation between defendant Morrison and witness Russell.

It is submitted that the petitioner was denied a fair and impartial trial not only by the admission of these highly prejudicial letters, but also by the undue newspaper and radio publicity, by the constant prejudicial remarks by the District Attorney to the jury, and by the refusal of the Court to allow the defendant to have his day in Court to defend himself by a short continuation so that the absent and important witness Roger Sampson might be produced to testify. All of these abuses, being cumulative in their effect, show that the petitioner was in fact deprived of a fair and impartial trial, as provided for by the Constitution of the United States.

Therefore, petitioner respectfully requests that a writ of Certiorari issue to the Superior Court of Pennsylvania and to the Supreme Court of Pennsylvania.

Respectfully submitted,

KARL E. MORRISON,

Petitioner

233 Schenley Drive
Erie, Pennsylvania

MAY 15 1956
HAROLD B. WILLEY, C

IN THE

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No. 910 October Term, 1955

COMMONWEALTH OF PENNSYLVANIA

vs.

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OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA

No. 1

In the Superior Court of Pennsylvania

Nos. 130, 132, 133 and 134 April Term, 1955

Commonwealth of Pennsylvania

v.

Karl E. Morrison,

Appellant

Appeal from the Judgment and Sentence of the Court of Quarter Sessions of the Peace and Oyer and Terminer of Erie County at Nos. 96, 97, 98 and 99 September Term, 1954

Opinion by Ervin, J.

Karl E. Morrison, an architect, 67 years of age, was convicted in the court below upon each of four indictments, consolidated for the purpose of trial, charging him with sodomy committed upon four boys ranging between 12 and 17 years of age. After his conviction the defendant's motion for a new trial was refused and he was sentenced on each bill to pay the costs of prosecution and to under-

go imprisonment for an indefinite term, the minimum of which was three and one-half years and the maximum seven years, all sentences to run concurrently. He thereupon took this appeal. The court below directed that defendant's appeal should operate in each case as a supersedeas.

The evidence of the Commonwealth consisted principally of the testimony of each of the four boys against whom the offenses had been committed. Jack Russell, 17 years of age, testified he had known the defendant approximately three years, that he had been at the defendant's home at 233 Schenley Drive, Erie, Pennsylvania, various times during the three years he had known him and that he had slept at the defendant's home for about a year during that three year period. He testified that on one occasion when he was staying at the home of the defendant he and Roger Sampson had slept one night on a day bed and the next morning he learned from Roger that the defendant had made improper advances during the night. He stated that the following night when he was awake the defendant committed sodomy upon him by taking his private parts into his mouth. He also testified that during the period he had stayed at the home of the defendant there had been about 10 or 12 similar occurrences, the last time being on March 29, 1954. Lloyd Stiffey, also 17 years of age, testified he had known the defendant for about three years and that he had stayed overnight at the home of the defendant. He stated the defendant had committed sodomy upon him; the last time being in September, 1952 at the defendant's home. Richard Russell, 14 years of age, testified he had known the defendant for four or five years. He stated he had slept at the defendant's home 20 times and that the defendant had committed sodomy upon

him on four different occasions, all at the defendant's home. He testified the last such occurrence was about eight or nine months prior to the trial. Arthur Russell, 12 years of age, testified he had known the defendant for four years, had slept at his home about 20 times and that on five occasions the defendant committed sodomy upon him.

There was no denial of the offenses by the defendant who did not testify in his own defense. The defense, however, presented 16 witnesses, some of whom testified they had been at the home of the defendant during some of the times when the Russell boys were there and had neither seen nor heard anything improper. Other defense witnesses testified that Jack Russell had stated the police kept a bright light on him for a long period of time until he signed a statement for them. Still other defense witnesses testified they had known the Russell boys but had never heard them make any complaint about the defendant's conduct.

Appellant contends he was denied a fair trial and his legal rights were violated by the refusal of the trial court to withdraw a juror and discharge appellant on the basis that the indictments set forth a March, 1954 date and sundry other times whereas the Commonwealth failed to prove any date in three of the four cases, and in the fourth case established a March 29 date but the year was not determined. This contention is clearly without merit. The Commonwealth is not restricted to proof of the crime on the exact date stated in the indictment. In Com. v. Levy, 146 Pa. Superior Ct. 564, 569, 23 A. 2d 97, we said: "It may be conceded that in the prosecution of crimes of the kind here involved the Commonwealth is not required to

prove their commission on the date laid in the indictment, but, failing in that, we think it has the burden, in order to sustain a conviction, of proving their commission upon some other date, fixed with reasonable certainty and being within the prescribed statutory period. . ." See also Com. v. Mourar, 167 Pa. Superior Ct. 279, 281, 74 A. 2d 734; Com. v. Gipe, 169 Pa. Superior Ct. 623, 626, 84 A. 2d 366. In the instant case the indictments were presented to the grand jury and true bills found on August 31, 1954. The jury could properly consider and convict upon any evidence that showed commission of the crime or crimes charged within two years prior to August 31, 1954. Reference to the testimony of the four complaining witnesses summarized supra clearly shows there was sufficient evidence to convict the defendant of the commission of the crime of sodomy on reasonably specific dates within the two year period preceding the exhibition of the bills of indictment to the grand jury on August 31, 1954. See Com. v. Dixon, 179 Pa. Superior Ct. 1, 115 A. 2d 811.

Appellant also contends he was deprived of a fair trial because of the improper manner of selecting the jury and the refusal of the court below to allow questioning of prospective jurors individually. This contention is without merit. The jury was properly called and impanelled. Twelve jurors were called, seated in the box and questioned by counsel as a group. This procedure was followed without objection. The practice of calling jurors in a group is proper in noncapital criminal cases. See Com. v. DiFilippo, 176 Pa. Superior Ct. 608, 109 A. 2d 224. As stated by the learned judge of the trial court: "The record indicates clearly that the jury was selected in accordance with the long accepted practice in our courts and

without objection." Moreover, the record does not reveal that any request for an oral examination of jurors was made by counsel for defendant. The record does show that counsel for the defendant was permitted to ask questions of the jurors and that the only question he asked was whether any juror was related to the victims in these cases.

Appellant also contends the trial court erred in refusing to continue the cases until an alleged important witness for the defense, who had been subpoenaed and for whom a bench warrant had been issued, could be brought into court. The witness was subpoenaed and directed to appear on September 13, 1954. The trial began on September 14, 954 and no complaint was made when it was first apparent the witness had not appeared. It was not until the third day of the trial that the absence of the witness was brought to the attention of the trial court, and a bench warrant was then issued. However, the defendant was not prejudiced by the absence of this witness. The record reveals the absent witness was only present at one of the many acts of sodomy which occurred in the home of the defendant and could not have been a material witness in the case on which sentence was imposed. An application for a continuance is addressed to the sound discretion of the trial court, whose action will not be disturbed in the absence of a manifest abuse of discretion. Com. v. Niemi, 365 Pa. 105, 73 A. 2d 713. Where, as here, the ground upon which a continuance is sought is the absence of a witness, whose testimony, if produced, would, at most, amount to a denial of the occurrence of one of several acts of sodomy alleged to have occurred in the presence of the absent witness, involving only one of four

victims and such testimony would not be material in the case on which sentence was imposed, the defendant was not prejudiced and the refusal of a continuance was not an abuse of discretion.

Appellant also contends that the remark made by the district attorney to the jury in his summation that: "There has been no denial of these acts, there has been no denial in any manner, shape or form, by anyone, of these acts" constitutes prejudicial error. Appellant considers the above quoted remarks prejudicial error because the crimes charged against appellant could have been denied or contradicted only by the appellant himself, and under the Act of May 23, 1887 he does not have to take the witness stand and his failure to do so may not be treated as creating any presumption against him, nor be adversely commented on by court or counsel during the trial. This contention is also without merit. As stated by Justice Bell in Com. v. Bolish, 381 Pa. 500, 522, 113 A. 2d 464: "We have recently decided this very question, adversely to the defendant, in Commonwealth v. Kloiber, 378 Pa. 412, 106 A. 2d 820. We there reiterated—citing many cases in support—that the Court and the district attorney could properly say that the evidence of the Commonwealth was uncontradicted and undenied, but neither the Court nor the district attorney could adversely refer to defendant's failure to take the witness stand or draw an unfavorable inference from his failure to testify."

Appellant also contends he was denied a fair trial by the court's refusal to withdraw a juror and grant a new trial because of remarks made by the district attorney, over objection of counsel for appellant, as to what the

effect of their guilty verdict would be and as to the penalty appellant might expect. Where improper remarks of counsel are to form the basis for an appeal, prompt objection and a motion for the withdrawal of a juror must be made, *coupled with a request that the words, as the trial judge understood them, be placed upon the record;* an alternative method of placing the remarks upon the record is by affidavit. Com. v. Drischler, 175 Pa. Superior Ct. 74, 103 A. 2d 467. In the instant case, though objection was made by counsel for appellant, and an exception to the overruling of the objection was granted by the trial judge, the record is silent as to the actual remarks and we are therefore unable to properly evaluate them. However, assuming the gist of the alleged prejudicial remarks to be as summarized in the brief of counsel for the appellant that "The District Attorney, . . . said that he felt no ill will towards the defendant and that he did not particularly care that he be punished but rather that he felt sorry for the defendant and that he should be separated from society and that the jury by their verdict should so separate him from society" it does not appear the jury would be influenced to the prejudice of the appellant. Considering the uncontradicted evidence of the commission of many acts of sodomy by the defendant the above quoted remarks might very well have elicited more sympathy for the defendant than he deserved rather than react to his prejudice. Moreover, the defendant was fully protected from any prejudicial effect by the trial court in its charge as follows: "The question of punishment is of no moment if the defendant is innocent and should not enter into your consideration in weighing the evidence in these cases."

Counsel for the appellant also complains of the reference by the district attorney to the defendant as a "sex pervert" and words of similar import and of statements to the effect that "if the jury allows men like Morrison to be out in society then we never know whose child will be next and that unless he is taken out of society there will be other children who will suffer." It is contended these statements were of such a nature as to excite the passion and prejudice of the jury. The record does not disclose the exact language alleged to have been used. However, assuming the accuracy of the above quoted excerpt from the brief of counsel for the appellant we do not find it to be such that its unavoidable effect would be to prejudice the jury. In Com. v. Capps, 382 Pa. 72, 114 A. 2d 338, involving the murder of a young girl after she had been ravished, where the district attorney posed the question to the jury: "What do you do with a mad dog" it was held not to be prejudicial. In any event, the effect of such remarks depends upon the atmosphere of the trial and the proper action to take is largely a matter for the presiding judge to determine. Com. v. Narr, 173 Pa. Superior Ct. 148, 96 A. 2d 155. The presiding judge in this case considered the remarks of the district attorney to be within the bounds of legitimate advocacy and we are satisfied there was no abuse of discretion in the refusal to withdraw a juror under the circumstances.

Appellant also complains of the admission in evidence of two letters written by Don Johnson, a witness for the defense, and mailed in the printed business envelopes of the appellant. The testimony concerning these letters is well summarized in the opinion of the court below as follows: "The letters, according to the commonwealth's

testimony, were written to one of the victims while he was in Ohio where he went in pursuance to a plan, suggested and urged by the defendant upon the victim in the presence of Johnson following defendant's arrest on this charge. In futherance of defendant's purpose to keep the victim out of Pennsylvania, he transferred an automobile to Johnson which immediately was reassigned by him to the victim, who then proceeded in the automobile across the state line into Ohio, where he remained for several days. One letter (postmarked Erie, Pa., May 25 and Conneaut, Ohio, Gen. Del. May 26) requests the victim 'If near a phone, call *22411* reverse.' (The number on argument was admitted to be that of defendant). The letter also advises 'Everything is fairly quiet here & under *control*' * and concludes 'P.S. And please keep *entirley* out of Pa.' * The other letter (postmarked Erie, Pa., May 27 and Conneaut, Ohio, Gen. Del. May 28) forwarded money as the defendant had previously promised, and in typewriting begins 'Enclosed is money order.' The words 'money order' are crossed out and above them is written 'no time to get money order. Enclosed is cash.' Included also is the typewritten direction 'Meantime stay over there out of sight.' ''

We are in agreement with the conclusion of the learned judge of the court below that "All the attending circumstances and the letters themselves indicate clearly that they are the acts of the defendant and the device used by him to accomplish his purpose and to carry out his plan. The leters are links in the chain of circumstances corroborating commonwealth's evidence and are, therefore, properly admissible. See Commonwealth v. Marion, 232 Pa. 413."

Nor is there any merit to appellant's contention he was denied a fair trial by the refusal of the trial court to withdraw a juror because of local newspaper accounts published during the trial and referring to defendant's previous conviction and sentence for a similar offense. This assertion was made in appellant's motion for a new trial. It is within the discretion of the trial court to determine whether a continuance should be allowed or a new trial granted on the ground of newspaper publicity unfavorable to the defendant. Com. v. Harrison, 137 Pa. Superior Ct. 279, 8 A. 2d 733. "In such matters, the court below is in a better position to determine whether the case should be postponed or a new trial granted, and the propriety of its action cannot, therefore, be questioned." Com. v. Deni, 317 Pa. 289, 176 A. 919. In the instant case it does not appear that the newspaper articles complained of had in any way prejudiced the defendant at the trial. The record fails to disclose that any juror read any of the articles. Moreover, the jury was specifically and repeatedly admonished by clear and forcible instructions to try the case on the evidence alone without being influenced by any other consideration.

Appellant also complains in this appeal of the denial of his petition for writ of coram nobis. No appeal was taken from the order of the court below dismissing the petition and the said order is not properly before us now.

The contentions of appellant to the effect that the evidence was insufficient to sustain the conviction and that the charge of the trial judge was inadequate are equally without merit. The record reveals ample evidence to sustain the conviction. As to the alleged inadequacy of the charge to the jury it is noted that counsel for appellant

took only a general exception to the charge. He did not ask for elaboration of the charge in any particulars nor did he request additional instructions. A reading of the charge in its entirety clearly demonstrates its accuracy and fairness.

We have carefully reviewed the entire record and are of the opinion that appellant was given a fair trial and his rights were fully protected.

The judgment is affirmed, and it is ordered that appellant appear in the court below at such time as he may there be called, and that he be by that court committed until he has complied with his sentence or any part of it which had not been performed at the time the appeal was made a supersedeas.

PETITION FOR A WRIT OF CERTIORARI

APR 30 195
HAROLD B. WILLEY,

IN THE
Supreme Court of the United States

No. 911 74 Term, 1955

COMMONWEALTH OF PENNSYLVANIA

vs.

KARL E. MORRISON,
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND TO THE SUPERIOR COURT OF PENNSYLVANIA

KARL E. MORRISON,
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233 Schenley Drive
Erie, Pennsylvania

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND TO THE SUPERIOR COURT OF PENNSYLVANIA

Petitioner, Karl E. Morrison, prays that a Writ of Certiorari issue to review the judgment of the Superior Court of Pennsylvania entered in the above entitled case on November 16, 1955, and the refusal of the Supreme Court of Pennsylvania to allow an appeal from the said judgment.

OPINIONS BELOW

The opinion of the Superior Court of Pennsylvania is reported in 180 Pa. Superior Court 133, and in 118 Atlantic 2d 263. The Supreme Court of Pennsylvania did not render an opinion.

JURISDICTION

The judgment of the Superior Court of Pennsylvania was pronounced on November 16, 1955, and a Petition For Allowance of Appeal was presented to the Supreme Court of Pennsylvania on December 8, 1955, filed at No. 2052A, Miscellaneous Docket, and on January 31, 1956 was refused.

The Act of Assembly of the Commonwealth of Pennsylvania on June 24, 1895, P.L. 212, Section 7 (amended

May 21, 1941, P.L. 47 Sec. 1), and Section 7 (a); 17 P.S. Secs. 181 and 182 provides:

> "It (the Superior Court of Pennsylvania) shall have exclusive and final appellate jurisdiction of all appeals in the following classes of cases: * * *
>
> All proceedings of any kind in the Court of Quarter Sessions of the Peace, or before any judge thereof, except in cases involving the right to a public office in which case the remedy by appeal to the Supreme Court shall not be affected by this Act".

The said Act of 1895, Sec. 7(e), 17 P.S. Sec. 190 provides:

> "Nevertheless in any action of proceedings whatever above committed to the final and exclusive decision of the said court there may still be an appeal from its judgment to the Supreme Court: * * *
>
> Second: If the case involved the construction or application of the Constitution of the United States or of any statute or treaty of the United States; * * *
>
> Fourth: If the appeal to the Supreme Court be specially allowed by the Superior Court itself or by any one justice of the Supreme Court."

The defendant, petitioner herein, presented his Petition for Allowance of Appeal to the Supreme Court of Pennsylvania on December 8, 1955, and on January 31, 1956 the petition was refused, without opinion. The jurisdiction of this Court is invoked under the provisions of the Act of Congress, June 25, 1948, c. 646, 62 Stat. 929, 28 U.S.C.A. Sec. 1257 (3).

Question Presented and Constitutional Provision Involved

QUESTION PRESENTED

1. Was the petitioner deprived of his right to due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States by adverse newspaper publicity unduly influencing the jurors; by the allowance into evidence of certain letters which served only to prejudice the jury against the defendant and deprive him of an impartial trial; and by the refusal of the Court to correctly interpret the crime with which petitioner was charged, to wit, Hindering Witness?

CONSTITUTIONAL PROVISION INVOLVED

The due process clause of the Fourteenth Amendment to the United States Constitution (U.S.C.A., Constitution, Part 3, page 2) which reads:

> "Section 1. * * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *".

STATEMENT OF THE CASE

Petitioner was charged with Hinde[illegible] a Witness from appearing at an Aldermanic Hearing to be held on May 28, 1954. The witness who was allegedly hindered was one Jack Russell and that at the time of the hearing the said witness was not under a subpoena or other legal process and did not enter into any recognizance for his appearance. It appears that the said Jack Russell left Erie, Pa. for Conneaut, Ohio on May 17, 1954, returned to Erie intermittently, and returned to Erie permanently on May 29, 1954, the day after the date set for the hearing which hearing was continued because of his absence.

Petitioner was tried before a jury on November 9, 10, 11, and 12, 1954 and found guilty. Motion for new trial was duly made, argued and denied by the trial Court. The trial was conducted during a wave of prejudicial newspaper publicity, and conducted unfairly by the allowance into evidence by the Commonwealth of derogatory and prejudicial letters which served only to inflame the jury against the petitioner, and by the unfair and erroneous construction placed on the Hindering Witness Act by the Court.

All of these points were raised in the trial court in the motion for a new trial and on argument thereon; and in the Superior Court of Pennsylvania in the Statement of Questions Involved; and in the Supreme Court of Pennsylvania in the Petition for Allowance of Appeal.

ARGUMENT

CERTIORARI SHOULD BE GRANTED IN THE INSTANT CASE BECAUSE AN IMPORTANT QUESTION AFFECTING THE RIGHTS OF ACCUSED UNDER THE FOURTEENTH AMENDMENT IS INVOLVED

The "due process" clause of the Fourteenth Amendment requires that the accused be afforded not only a fair and impartial trial but also that all the incidents of the trial be fair and without prejudice to his rights. The defendant did not receive a fair and impartial trial in the Court below in the manner following:

1. Adverse and prejudicial newspaper publicity before and during the progress of the trial so influenced the jury that the trial was only a legal gesture to register a verdict they had already decided on based on the information in the newspapers, radio and television. The articles about the defendant recited his previous criminal record and other such matters which were not admissible as evidence in the trial but which the newspapers made sure the jury received at any rate.

Articles on the defendant appeared on November 10, 11, and 12, 1954 in the Erie Daily Times, the largest newspaper in Erie, which articles recite his previous criminal record in connection with this, a mere misdemeanor case.

In *Griffin vs. United States*, 295 F. 137, 1924, the Court

of Appeals awarded a new trial where newspapers containing prejudicial statements were read by the jurors and said:

> "It is the right of a defendant accused of a crime to have nothing reach the mind of the jury concerning the case except strictly legal evidence admitted according to law, and if facts prejudicial to him reach the jury otherwise it is the duty of a trial judge to grant a new trial."

So similarly *United States vs. Ogden*, 105 F. 371; and *Shepherd vs. Florida*, 34 U.S. 50, 95 L. Ed. 740, 1951, wherein a conviction of murder was reversed, and where Justice Jackson expressed himself strongly on the subject of trial publicity:

> "But prejudicial influences outside the courtroom, becoming all too typical of a highly publicized trial, were brought to bear on this jury with such force that these defendants were prejudged as guilty and that the trial was but a legal gesture to register a verdict already dictated by the press and public opinion which it generated".

So similarly was the case of the two newspapers in the City of Erie which set out to persecute the defendant and all other persons who had a prior sex offense record, whether guilty or not, thus defendant was deprived of a fair and impartial trial.

2. The defendant was denied a fair and impartial trial in that irrelevant but prejudicial letters were allowed into evidence, and which served only to prejudice the jury against the defendant.

One of the letters was postmarked Erie, Pa., May 25, 1954 and Conneaut, Ohio, May 26, 1954 and requested Jack Russell:

> "If near a phone call 2-2414 at a few minutes after noon Friday. Everything is fairly quiet here and under control, and I hope you land a job.
>
> D. C. Johnson
>
> P.S. And please keep entirely out of Pa."

The second letter is postmarked Erie, Pa., May 27, 1954 and Conneaut, Ohio, Gen. Del. May 28, 1954, is typewritten and reads in part:

> "Enclosed is money order. * * * No time to get money order. Enclosed is cash * * * Meantime stay over there out of sight."

The letters are in no way signed by the defendant, and they were not shown to have been authorized by him, or that they were written with his knowledge, and hence were not admissible against the defendant. Thus the present case differs from *Comm. vs. Marion*, 232 Pa. 413, wherein the letter writer testified that the defendant in that case requested him to write the letter and told him the purpose for which the letter was being written. Such is not the present case.

In *United States vs. Nicola*, 72 F. 2d 780, 1934, the Court of Appeals said:

> "A letter does not prove itself. In order to make the letter evidence the letter must be shown to have been written by the person against whom it is produced, or by someone authorized to act in his behalf",

and awarded a new trial on improper admission of this evidence.

3. Further, the defendant was deprived of a fair and impartial trial in that the Hindering Witness Act does not apply to this type of situation and yet he was subjected to the erroneous interpretation of the same by the Court below.

The Hindering Witness Act reads:

> "Whoever unlawfully dissuades, hinders or prevents, or attempts to dissuade, hinder or prevent, any witness from attending or testifying before any Committee of the Legislature, or before any Court, Judge, Justice, or other judicial tribunal, *when so required by virtue of any legal process or otherwise,* is guilty of a misdemeanor * * *."

In the present case the said Jack Russell was not required to appear at the Aldermanic Hearing in any manner, be it by subpoena or otherwise, and was not made a material witness as provided by statute.

The next section of the same act, the Absconding Witness Section, Act of June 24, 1939, P.L. 872, Sec. 325; 18 P.S. 4325 uses exactly the same words "*Required by virtue of legal process or otherwise*"; and yet the Court below stated that the said Jack Russell was not an absconding witness inasmuch as he had not been served with a subpoena. The language of the two sections of the Act is exactly the same, word for word, and yet the Court stated that in the case of the witness Jack Russell a subpoena was necessary, but that in the case against the defendant Morrison a subpoena was not necessary. The defendant is of the opinion that the words should be uniformly interpreted, and not interpreted in one separate manner against the defendant, and that the defendant did not receive a

proper ruling from the Court and did not receive a fair and impartial trial to which he is entitled under the due process clause of the Constitution.

The record clearly shows that the said Jack Russell was not under any recognizance or any compulsion to attend the hearing, and was not under subpoena (pages 17a, 25a, 26a of record).

All of the above abuses are cumulative in their effect, and show that the petitioner was in fact deprived of a fair and impartial trial as guaranteed by the Constitution of the United States.

The petitioner, therefore, respectfully requests that a Writ of Certiorari issue to the Superior Court of Pennsylvania and to the Supreme Court of Pennsylvania.

Respectfully submitted,
KARL E. MORRISON,
Petitioner.

233 Schenley Drive
Erie, Pennsylvania

FILED
MAY 15 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

No. 911 October Term, 1955

COMMONWEALTH OF PENNSYLVANIA

vs.

KARL E. MORRISON,

Petitioner

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND TO THE SUPERIOR COURT OF PENNSYLVANIA

KARL E. MORRISON,
Petitioner.

233 Schenley Drive
Erie, Pennsylvania

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.
Frank Baumeister, Erie County Representative, Court House, Erie, Pa.

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OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA

No. 2

In the Superior Court of Pennsylvania

No. 131 April Term, 1955

Commonwealth of Pennsylvania
v.
Karl E. Morrison,
Appellant

No. 153 April Term, 1955

Commonwealth of Pennsylvania
v.
Donald C. Johnson,
Appellant

Appeals from the Judgments and Sentences of the Court of Quarter Sessions of Erie County at Nos. 114 November Sessions, 1954 and 113 November Sessions, 1954, respectively

Opinion by Ervin, J.

Karl E. Morrison and Donald C. Johnson were indicted on separate indictments, consolidated for the pur-

pose of trial and convicted under the Act of June 24, 1939, P. L. 872, §324, 18 PS §4324,[1] for hindering a witness. After their conviction motions for new trials were refused and each was sentenced to pay the costs of prosecution and undergo imprisonment for one year. These are appeals from the judgments and sentences.

Karl Morrison, one of the defendants in this case, was charged with sodomy and a preliminary hearing thereon was set before the alderman of the fourth ward in Erie, Pennsylvania, for May 17, 1954. Jack Russell was to appear at that hearing as a witness against Morrison. The hearing was continued to May 21, 1954, and then continued to May 28, 1954. On May 21, 1954 a subpoena was issued for Jack Russell to appear at the office of the alderman on May 28, 1954 at 3:30 p.m. The subpoena was not served prior to the May 28 hearing. Russell was served on May 29, 1954 and appeared at the hearing held on June 7, 1954. The charges against the defendants in the instant case were brought by the Commonwealth for allegedly hindering the witness, Jack Russell, from appearing at the hearing scheduled for May 28, 1954.

The principal witness for the Commonwealth was Jack Russell. He testified that on May 8 or 9 he knew Karl Morrison had been arrested on a criminal charge

---

[1] The Act reads: "Whoever unlawfully dissuades, hinders, or prevents, or attempts to dissuade, hinder, or prevent any witness from attending and testifying before any committee of the Legislature, or before any court, judge, justice, or other judicial tribunal, when so required by virtue of any legal process or otherwise, is guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars ($500), or undergo an imprisonment not exceeding one (1) year, or both."

and that he was to be a witness against him. He testified that on or about May 17 he met both defendants at McKinley Park and was told by Morrison it would be best for him to leave Erie because he, Russell, might be charged with the same offense with which Morrison was charged. As to Morrison, Russell testified "he said that he'd give me a car to leave town with and he'd provide me money." After this conversation the testimony discloses that Morrison, Johnson and Russell went to the office of a Justice of the Peace where Morrison transferred the title to a 1940 Buick coupe to Johnson and later the same day returned with Johnson and Russell and title to the automobile was transferred from Johnson to Russell. The fees involved in this transaction were paid by Morrison with his personal check. Russell testified that Morrison suggested he go to Conneaut, Ohio and that Morrison said "he'd send me approximately $10.00 every two days." Russell then left for Conneaut, Ohio on about May 17, 1954 and while there he said he received about $40.00 to $50.00 through Johnson. Russell identified two letters he received while in Conneaut from Don Johnson, one postmarked May 25 and the other May 27. One of the letters requested Russell "If near a *phone* call *22414* reverse." The telephone number given is listed in the name of defendant Morrison. The letter also advises "Every thing is fairley quiet here & under *control*" and concludes with "P.S. And please keep *cutirley* out of *Pa.*" The other letter is typewritten and begins "Enclosed is money order." The words "money order" are crossed out and above them is written "No time to get a money order. Enclosed is cash." Also included was a direction "Meantime stay over there out of sight." On cross examination it was developed that at the time of the conversations at

McKinley Park Russell knew there was to be a hearing for defendant Morrison on May 17 and that Morrison told him he could get it postponed. Russell denied he went to Conneaut because he had relatives there and also denied that he left Erie because of fear he would be charged with fornication and bastardy. Russell returned to Erie on May 28 and after seeing his brother and mother went to police headquarters.

In testifying for the defense a sister of Russell testified that he had proposed to her husband stealing some of defendant Morrison's oil paintings and when her husband refused to do so, Russell said Morrison couldn't do anything because he'd back up the story of his brothers concerning the morals charge against Morrison. Defense witnesses also testified that Morrison owed Russell about $60.00 for work he had done for him and that it was a practice for the money to be paid to Johnson who would then pay Russell his share. Several defense witnesses also attempted to establish a possible reason for Russell's flight to Conneaut as being due to his fear of being charged with fornication and bastardy. Karl Morrison did not testify in his own defense. However, Don Johnson took the stand and testified he was employed by Morrison and had been for about a year, that Jack Russell had worked for Morrison and that Morrison would pay him and he in turn would pay Russell. He testified that he and Russell lived together and were close friends. He testified he took no part in the conversation at McKinley Park and had no conversation about Russell leaving Pennsylvania. He testified he didn't know and had not been told that Russell was to be a witness against Morrison. Johnson also testified that Morrison gave Russell the car for pay-

ment of part of the money Morrison owed Russell and that the money he sent Russell was for the balance due him for work done on Morrison's farm. Johnson also testified that the reference to keeping out of Pennsylvania in the letters he wrote to Russell was because of Russell's possible involvement in a fornication and bastardy case. This letter testimony was completely refuted when, on cross examination, he testified that he was the father of the child in that case and had been charged with paternity of that child prior to Russell's departure for Conneaut. Johnson's testimony reads: "Q. As a matter of fact, you were the father of that child that's been talked about here, aren't you? . . . A. As far as I know, yes. . . . Q. And you knew he [Russell] was not going to be charged with being the father of the child? A. Yes."

The jury found both defendants guilty and recommended leniency for Johnson.

The contention of the appellants that they were denied fair and impartial trials because of the consolidation of the indictments for trial is clearly without merit. Both defendants were charged with the same offense—hindering Commonwealth witness Jack Russell from appearing at a preliminary hearing for the defendant Morrison on a charge of sodomy. The witness was one of the boys against whom the offense had been committed and had given a statement to the police; he was aware of Morrison's arrest and of the scheduled preliminary hearing; he knew he was to be a witness at that hearing though he had not been served with any legal process. The charges grew out of the same occurrences and the evidence against both defendants was substantially the same. The consolidation of indictments for purpose of trial is a matter for the

court's discretion and will not be disturbed unless there has been a manifest abuse of discretion or the joint trial so unfair as to be clearly unjust and prejudicial. Com. v. Russo, 177 Pa. Superior Ct. 470, 111 A. 2d 359. The instant case falls squarely within the principle enunciated by Justice Bell in Com. v. Kloiber, 378 Pa. 412, 415, 106 A. 2d 820: "Especially is a joint trial permissible, if not advisable, when the crimes charged grew out of the same acts and much of the same evidence is necessary or applicable to both defendants: [citing cases]."

Appellants also contend that since the witness, Jack Russell, was not under any legal process or subpoena, no offense was committed under the statute here involved. We concur in the conclusion of the learned judge of the court below that "This View fails to give meaning to the phrase 'or otherwise' and would limit the offense as involving only witnesses required to appear 'by virtue of any legal process.' Many witnesses appear before judicial tribunals without legal process, and it is the protection of all such witnesses that is intended by the comprehensive word 'otherwise.' In our view a witness required to appear by any method, other than legal process, or one who voluntarily appears, comes within the meaning of 'otherwise' as used in the statute." That this conclusion is correct is substantiated by the change in the wording in the present act from that contained in the Act of March 31, 1860, P.L. 382, §11, from which the statute here involved was derived. In the former act the requirement of attendance only concerned a witness who had been required to attend "by virtue of any writ of subpoena or other legal process, or who may have been recognized to attend. . .". In order to constitute a violation of the

Act of 1860 the witness had to be under subpoena or other legal process. However, the change in the act, by the addition of the phrase "or otherwise" as it now appears in The Penal Code, in order to have any meaning, must include those witnesses who are required to appear whether directed to do so by legal process or not. In the instant case the witness, whose testimony is essential to support the charge of sodomy against one of the defendants, must be considered a witness who is required to appear though he was not served with a subpoena.

Appellants also contend it was error for the court below to allow the Commonwealth witness to testify as to certain letters he received and to allow such letters to be introduced into evidence. The letters were admittedly written by one of the defendants, Johnson, to Russell, the Commonwealth witness. The money enclosed was provided by the other defendant, Morrison. The attempted explanation for the direction contained in the letters for the witness to stay out of Pennsylvania was completely refuted by Johnson's testimony. He testified that these directions to Russell to stay out of Pennsylvania were because of Russell's involvement in a fornication and bastardy case. However, on cross examination he admitted he was the father of the child involved and had been charged with paternity of that child prior to Russell's departure for Comeaut, Ohio. It clearly appears the letters are evidentiary in character and properly admissible against both defendants. They were links in the chain of circumstances involving both defendants and are admissible against both. See Com. v. Marion, 232 Pa. 413, 81 A. 423.

Appellants also contend the trial court erred in allowing the district attorney to question Johnson as to what

his explanation of the letters written by him to Russell had been in a previous trial in which the letters had been admitted as evidence. In the instant case Johnson testified he wrote Russell, the Commonwealth witness, to stay out of Pennsylvania because of his (Russell's) possible involvement in a fornication and bastardy case. The district attorney, in cross examination, challenged this explanation and confronted him with his testimony in the prior trial in which he had offered no explanation of the letters. The district attorney further attacked Johnson's explanation by eliciting the admission that prior to sending the letters, he had entered a plea of guilty to the precise charge he had used as his explanation for writing letters to Russell directing him to stay in Ohio. We find no error in this cross examination in view of Johnson's direct testimony. The scope of cross examination of the district attorney was limited to matters brought out in direct examination. Moreover, the mere fact that cross examination disclosed Johnson's guilt on a separate offense does not make that proof inadmissible, where, as here, it is relevant on the question of Johnson's guilt in hindering a witness. See Com. v. Robinson, 163 Pa. Superior Ct. 16, 60 A. 2d 824. See also Com. v. Wable, 382 Pa. 80, 114 A. 2d 334.

Appellants further contend it was error for the court below to allow the district attorney to bring out on cross examination of Virginia Sprague, a defense witness, evidence of morals charges having been previously brought against Morrison, one of the defendants in this case. The testimony reveals that on direct examination the defense witness, in attempting to establish possible bias of Russell against defendant Morrison, testified concerning a statement attributed to Russell that he would back up a

story of his brothers concerning Morrison. In the cross examination of the district attorney he elicited the explanation that by "story" was meant the morals charges brought against Morrison. Obviously, the cross examination was limited in its scope to matters brought out on direct examination and was therefore proper. Nor is there any merit to the contention of appellants that it was error of the court below to restrict cross examination of Russell by counsel for the appellants as to his efforts in preventing the destruction of Morrison's property by his brothers. Such questioning could have little if any relevancy in the instant case. Nor is there any foundation for appellants' contention they were denied a fair trial by adverse newspaper publicity prior and during the trial. The basis of this contention was the publication in the Erie Daily Times of a newspaper article in which it was brought out that Morrison, one of the defendants here involved, had been convicted of "four counts of morals offenses against young boys." The lower court properly refused appellants' motions for the withdrawal of a juror on the ground of unfavorable newspaper publicity. Such matters are within the discretion of the trial court. Com. v. Deni, 317 Pa. 289, 176 A. 919. There was no abuse of that discretion shown here. Furthermore, the record clearly reveals the trial court took adequate precautions to prevent any prejudice against the defendants by repeatedly admonishing the jury before and during the trial and at recesses to ignore any outside information they might see or hear and to try the case on the merits without influence from any outside sources.

We are also agreed the court below did not err in summarily dismissing the petition for writ of coram nobis.

The vrit of error coram nobis lies only where a petitioner brings forth some fact outside the record which was not known at the time judgment was rendered, through no fault of petitioner, and which had it been known would haveprevented the judgment. Com. v. Kadio, 179 Pa. Superior Ct. 196, 115 A. 2d 777. No such fact has been brought out in the petition in this case and it was properly lismissed.

Ve have read carefully the entire charge and are convnced that it was fair to both defendants and that objections to it are without merit. We are also convinced the lefendants had a fair trial and that the evidence warranted conviction.

Judgments of sentence affirmed.